IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

SECOND APPEAL NO. 579 OF 2004

Chandrabhan @ Chandrakant Surajmal
Lunkad (Since deceased) through Legal
Representatives - Appellant Nos.5,6,7 &
Mrs. Madhubala Jaikumar & Ors. ... Appellants.

V/s.

1. Vasantlal Puranmal Gadia & Ors. ... Respondents.

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Mr. Prafull B. Shah for the Appellants.
Mr. Vineet B. Naik with Ms. Deepa Ahuja for
Respondents 1,2,3,5 and 6.

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CORAM : DR.D.Y. CHANDRACHUD J.

13TH JULY 2007.

P.C. :

. The learned Trial Judge decreed the suit instituted in 1986 by a Judgment and Order dated 27th June 1997 and issued a declaration that certain house properties, bearing City Survey Nos.739, 739/1, 128 and 34 at Chinchwad, District Pune, were owned and possessed by Ramabai Gadia and had devolved on the original Plaintiffs and Defendants 15 and 16 after her lifetime. Defendants 1 to 14 were directed to give possession of the properties to the Plaintiffs

and to Defendants 15 and 16. The Judgment and Decree was confirmed in Appeal by the Additional District Judge at Pune on 25th October 2002. The Appellants before the Court are the legal heirs and representatives of Surajmal and were Defendants 1 and 2 to the proceedings in the suit.

2. Punamchand died some time before 1974 leaving behind him four sons Ramchandra, Raghunath, Ganeshmal and Surajmal. Ganeshmal was given in adoption and in the Second Appeal the dispute originated in the estate which devolved on Ramchandra, Raghunath and Surajmal. Ramchandra expired in 1943, Raghunath in 1955 and Surajmal in 1947. The learned Trial Judge found on the basis of the evidence on record that a partition had taken place between the sons of Punamchand viz. Ramchandra, Raghunath and Surajmal. This finding is based on an elaborate discussion of the evidence on record commencing from paragraph 38 of the Judgment of the Trial Judge. Raghunath's will of 1st February 1955 (Exhibit 432) mentioned that each of the brothers were separate and were in separate possession of their respective properties. The evidence showed that Raghunath had dealt with his

properties independently. Rent notes and sale deeds were produced and marked in evidence on the record of the Trial Court. Documentary evidence to show that the three brothers had purchased properties separately was on the record of the Trial Court. The documentary evidence was consistent with the oral evidence on record. D.W.1 in the course of his deposition stated that after the adoption of Ganeshmal his three brothers were not joint. The Trial Judge found that the documents produced by the Defendants themselves showed that the three brothers were separate. The finding of the learned Trial Judge has been confirmed in Appeal by the Appellate Court.

3. Apart from the evidence both documentary and oral which has been considered by both the Courts below, the attention of the Court has also been invited to the admission contained in the cross examination of D.W.10 Nitin, who deposed as follows :-

" It is true that there is no document with us to show that Ramchandra Punamchand Lunkad

> was a manager of joint family. There is no documentary evidence to show that all the said 4 brothers Ramchandra, Raghunath, Surajmal and Ganeshmal were a joint family. It is also true that after the adoption of Ganeshmal, the other 3 brothers were not joint in family and there is no document to show it."

On this aspect to the findings the interference of the Court is not warranted in a Second Appeal. No substantial question of law arises. The finding is clearly based on the documentary and oral evidence on record.

4. The next aspect of the matter is the determination of the learned Trial Judge, confirmed in Appeal, that after the lifetime of Ramchandra, his properties which devolved on his brothers Raghunath and Surajmal were partitioned between two brothers. The genealogy shows that Ramchandra's wife pre-deceased him and that he had no children from the marriage. It is undisputed that his properties would

devolve on Raghunath and Surajmal. In order to arrive at the finding that there was a partition of the estate of Ramchandra as between Raghunath and Surajmal, the Learned Trial Judge has discussed the evidence, commencing from paragraph 44 of the Judgment. The Appellate Court has once again re-appreciated the documentary and oral evidence on record and has confirmed that there was a partition as between Raghunath and Surajmal of the estate of Ramchandra after the death of Ramchandra. At the hearing of the Second Appeal, it is this finding which has been questioned on behalf of the Appellant. In order to assail the finding, reliance has been based on the application filed by Raghunath and Surajmal on 24th January 1944 for the grant of Letters of Administration (Exhibit 286); the order passed by the competent court thereon on 29th August 1944; an application filed for the grant of a Succession certificate on 10th April 1950 (Exhibit 320) and the order dated 31st August 1950 passed thereon. The submission before the court is that the two brothers had stated in their application of 10th April 1950 that Ramchandra had expired on 17th March 1943 and was a co-parcener of an undivided family.

5. Now, before dealing with the submission, it merits emphasis that the grant of Letters of Administration does not as a matter of law amount to the determination on a question of title. A question of title has to be adjudicated upon independently in an appropriate proceeding. After the death of Ramchandra, his two surviving brothers moved an application on 24th January 1944 for the grant of Letters of Administration in respect of the fixed deposits and postal deposits of the deceased. An order for the grant of Letters of Administration was passed. That order however appears not to have been acted upon, for on 10th April 1950, an application was filed by Surajmal's children, Surajmal himself having expired in 1947, for the grant of a Succession certificate in respect of the fixed deposits and postal deposits of deceased Ramchandra. This is evident from the fact that Sr.Nos.1,2 and 3 of the schedule to the application are the same properties mentioned in the earlier application for the grant of Letters of Administration. Significantly, the application for the grant of a Succession certificate in respect of the fixed deposits and postal deposits

held in Ramchandra's name was filed by Surajmal's children which was consented to by Raghunath. This is consistent with the position which has been accepted by both the Courts below that there was a partition of the estate of Ramchandra which had come to the hands of Raghunath and Surajmal. Unless that was the case, there was no occasion for an application for the grant of a Succession certificate being made by Surajmal's children in 1950. Both the Courts below had on the basis of the documentary and oral evidence on record arrived at the conclusion that there was a distribution of the estate of the deceased Ramchandra between the two brothers. This finding is based on the evidence on the record.

6. Raghunath executed a Will on 1st February 1955. Dr. S.V. Inamdar who was the only surviving attesting witness to the Will deposed in evidence in respect of the mental condition and the fitness of the testator. The contention of the Counsel for the Appellants before this Court was that the Will has not been duly proved because only one attesting witness stepped into the witness box. This submission is clearly contrary to the plain terms of

Section 68 of the Evidence Act under which a document which is required by law is to be attested, shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Reference may be made in this context to the judgment of the Supreme Court in **Kashibai V/s. Parvatibai** 447 S.C.1948. There can be no valid execution of a Will unless the provisions of Section 63 of the Succession Act are complied with. In so far as proof of execution is concerned, one attesting witness is required to be produced in evidence. In the present case, the sole surviving attesting witness gave evidence.

7. In the circumstances, the finding which has been arrived at by the Appellate Court is that after the death of Punamchand, there was a partition between his three sons; that in the partition the suit properties were allotted to the share of Ramchandra and that after his death they were distributed between Raghunath and Surajmal. These findings are borne out from the evidence on record.

The house bearing C.T.S. 34 was admitted in the evidence to be the property of Raghunath.

8. For all these reasons, interference in a Second Appeal is not warranted. No substantial question of law would arise. The Second Appeal is accordingly dismissed.